Quarterly Report

OF THE

ATTORNEY GENERAL

OF

ALABAMA

FOR THE PERIOD

FROM JANUARY 1, 1971

THROUGH MARCH 31, 1971

VOLUME 142

WILLIAM J. BAXLEY, Attorney General

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QUARTERLY REPORT

of the

ATTORNEY GENERAL

of

ALABAMA

For the Period

From January 1, 1971

Through March 31, 1971

TO THE STATE, COUNTY, AND MUNICIPAL OFFICERS OF ALABAMA:

This Quarterly Report of the Attorney General of Alabama, which includes all official opinions rendered by the Attorney General from January 1, 1971, through March 31, 1971, is published in compliance with the provisions of Title 55, Section 228, Code of Alabama 1940.

Under this section of the Code, I am required to send seven copies of this Quarterly Report to each judge of probate in the State, and the judge of probate, in turn, is required to deliver one copy each to the clerk of the circuit court, the sheriff, the tax collector, the tax assessor, the county superintendent of education, and the deputy county solicitor of his county. This section also requires that I send a copy of this report to each circuit solicitor and the chief executive officer of each incorporated municipality in the State.

The office of the Attorney General is anxious to render prompt and efficient service to the State, county, and municipal officials. If you have any suggestions to make regarding the improvement of the service, I shall be glad to hear from you.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

WILLIAM J. BAXLEY
Attorney General

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Deputy Attorney General

E. RAY ACTON
Executive Assistant

WALTER S. TURNER
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OPINIONS

January 5, 1971

Honorable W. R. Collins

Sheriff

Jackson County

Courthouse

Scottsboro, Alabama 35768

Counties—Sheriffs—Salaries.

1. Where the salary of the Sheriff is controlled by Act No. 1170, Acts of Alabama 1969, page 2179, the county governing body is authorized to employ necessary personnel for the operation of the Sheriff's office.

2. The county governing body may, within its discretion, employ a Secretary for the Sheriff.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Reference is made to your request of October 2, 1970, for an opinion of this office in which you state that, at the expiration of your present term of office, the Sheriff's office will begin operating on the salary system prescribed by Act No. 1170, Acts of Alabama 1969, page 2179. You ask whether the governing body of Jackson County is required to furnish funds for the hiring of a Secretary for the Sheriff's office after January 16, 1971, the day on which Act No. 1170, supra, becomes effective.

Your request points out that Section 3 of Act No. 1170, supra reads as follows:

> "The county governing body shall also furnish the sheriff with the necessary quarters, books, stationery, office equipment, supplies, postage and other conveniences and equipment, including automobiles and necessary repairs, maintenance and all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office."

The last paragraph of your request, in which you state your questions, reads as follows:

> "I hereby request an official opinion as to (1) Whether it was the intent of the legislature in passing Act No. 1170 to require a sheriff to hire a secretary or clerical assistant out of his salary; and (2) Whether it is permissible for the Jackson County Board of Revenue to fail to provide funds for a secretary, who is reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office, in light of the provisions and intent of Act No. 1170."

Upon examination of Act No. 1170, supra, we find that said statute is sufficiently broad to authorize the county governing body to employ necessary personnel for the operation of the office of sheriff. We find no provision in said statute which makes mandatory the employment of a secretary or other specific personnel.

Therefore, I am of the opinion that the governing body of Jackson County is authorized, within its discretion, to employ a secretary for the office of sheriff upon the effective date of Act No. 1170, supra.

Very truly yours

MacDONALD GALLION

Attorney General

January 15, 1971

Honorable E. W. Enslen

Chairman

Elmore County Commission

Wetumpka, Alabama 36092

Costs and Fees—Counties—Elmore County—Expenses—Fees—Funds—Insane Persons—Prisons and Prisoners—Sheriffs.

1. Such counties required, under provisions of Act No. 1170, Acts of Alabama 1969, page 2179, placing all sheriffs in the State on salary, must furnish automobiles as necessary for office of sheriff.

2. Under local act applicable to Elmore County, pistol permit fees may continue to be paid into county to credit of sheriff's fund to be used by the sheriff for purchase of equipment, materials, and supplies as required.

3. Under provisions of Act No. 1170, supra, the sheriff and his deputies shall be entitled to collect and retain such mileage and expense allowances as may be payable according to law for returning or transferring prisoners and insane persons to or from points outside the county.

4. Under preceding provisions of Act No. 1170, supra, sheriff and deputy shall be entitled to a mileage allowance or fee, even though using a county vehicle except where such an allowance or fee is specifically limited by statute as is the case in Title 11, Section 100, and Title 15, Section 72, Code of Alabama 1940, Recompiled 1958.

5. Under provisions of Act No. 1170, supra, the county governing body is authorized to employ necessary personnel for the operation of the sheriff's office, including additional deputies as required.

6. All laws, general, local, or special, in conflict with provisions of Act No. 1170, supra, are specifically repealed.

Opinion by Assistant Attorney General Webb.

Dear Judge Enslen:

I have your request for an opinion, dated November 23, 1970, which is as follows:

"Is Act No. 1170 of the Acts of Alabama, passed in the Special and Regular Sessions of the 1969 Session of the Alabama Legislature constitutional?

"Assuming that you give an affirmative reply, would the Elmore County Commission also be required to furnish the deputies' automobiles?

"Also, would the fees now retained by the Sheriff for pistol permits be paid into the General Fund?

"Will the Sheriff be entitled to mileage for transfer of insane patients using the County furnished and maintained vehicles?

"Will the Sheriff be entitled to mileage now paid as removal fees if he is using County furnished and maintained vehicles?

"Does this Act change those laws stipulating the number of deputies allowed the Sheriff in Elmore County?"

This office has no authority to pass upon the constitutionality of an act of the Legislature. I, therefore, express no opinion on your first question.

Section 3 of Act No. 1170, Acts of Alabama 1969, page 2179, specifically requires that counties furnish to sheriffs such automobiles as may be necessary for the efficient conduct of the affairs of the office of the sheriff. If this requirement of the act is carried out by the county governing body of your county, it must be assumed that the deputies may use the automobiles furnished to the sheriff and I am, therefore, of the opinion that the county commission should furnish such automobiles as are necessary for the affairs of the office of sheriff.

In answer to your third question, I refer you to Act No. 70, Acts of Alabama 1969, page 360. This act increases the fee for issuance of a permit to carry a pistol in a vehicle or concealed on or about the person as provided in Title 14, Section 177, Code of Alabama 1940, Recompiled 1958, to five dollars. The fee is collected by the sheriff and deposited in the county treasury. Four dollars is to be credited to a special fund

or account and may be drawn and used at the discretion of the sheriff for the purchase of equipment, materials and supplies and for payment of compensation of additional personnel when and as needed in the sheriff's department. The fee provided for in Act No. 70, supra, is not a fee accruing to the sheriff for services rendered by him but is a fee accruing to the county to be used by the sheriff in a particular manner. It is similar to sheriff's funds created by local law in many of the other counties and, as such, in my opinion, not subject to the provisions of Section 2 of Act No. 1170, supra.

Your fourth and fifth questions have been answered in an opinion of this office to Honorable A. W. Steineker, Jr., Chief Examiner of Public Accounts, dated September 8, 1969. This opinion dealt with a local act putting the Sheriff of Etowah County on a salary basis. Under the provisions of the local act, the salary would be in lieu of fees and commissions and allowances except allowances " . . . providing for the payment to him as mileage and expense allowances for returning or transferring prisoners and insane persons to points outside the county." The provisions of Act No. 1170 are very similar in scope and design to those contained in the local act dealing with Etowah County. Section 1 reads, in pertinent part:

> "The sheriff and his deputies shall, however, be entitled to collect and retain such mileage and expense allowances as may be **payable according to law** for returning or transferring prisoners and insane persons to or from points outside the county." **(Emphasis supplied.)**

There are several different statutes, as stated in the opinion to Mr. Steineker, supra, under which mileage is paid. The intent of Act No. 1170 is clearly expressed that the sheriff shall receive a mileage allowance or fee of ten cents per mile even though he is using a county vehicle, except where such an allowance or fee is specifically limited by statute. This holding is in keeping with the opinion expressed by this office in Quarterly Report of Attorney General, Volume 110, page 60. An example of a specific expression by law where the shriff would not be entitled to the ten cents per mile is that contained in Title 11, Section 100, Code of Alabama 1940, Recompiled 1958, which provides, in pertinent part, as follows:

> ". . . (if the trip is made **in the personal** car of the sheriff or his deputy or agent, he shall be allowed ten cents per mile in lieu of other transportation expenses) . . . " (Emphasis supplied.)

In this regard note also the provisions of Title 15, Section 72, Code of Alabama 1940, Recompiled 1958. I am of the opinion that Act No. 1170, supra, does not in this regard repeal the provisions of Title 11, Section 100, supra, nor Title 15, Section 72, supra; therefore, the sheriff is not entitled to ten cents per mile when using a county vehicle on removal of prisoners when such removal is reimbursed under the provisions of either Section 72 of Title 15, supra, or Section 100 of Title 11,

supra. However, for removal of insane persons to the hospital, no such prohibition is contained. See Title 11, Section 100(1), Code of Alabama 1940, Recompiled 1958, and I am, therefore, of the opinion that, for such removal of insane persons, the sheriff is entitled to the ten cents per mile claimed, even though he uses a county vehicle in such removal.

In answer to your sixth question, I refer you to Sections 3 and 5 of Act No. 1170, supra. Section 3 requires the county governing body to furnish the sheriff with the necessary quarters, conveniences, equipment, and " . . . all expenses incidental thereto, as are reasonably needed for the proper and efficient conduct of the affairs of the sheriff's office." Section 5 specifically repeals all laws or parts of laws, general, local, or special, in conflict with the provisions of this act.

I am enclosing also a copy of an opinion to Honorable W. R. Collins, Sheriff, Jackson County, under date of January 5, 1971, in which this office held that where the salary of the sheriff is controlled by Act No. 1170, supra, the county governing body is authorized to employ necessary personnel for the operation of the sheriff's office, and the county governing body may, within its discretion, employ a secretary for the sheriff. I, therefore, answer your sixth question in the affirmative, and I am of the opinion that the county governing body may employ such necessary personnel for the operation of the office of sheriff. There is, however, no provision in the statute which makes mandatory the employment of a secretary, a deputy sheriff, or any other specific personnel, and such, therefore, is, in my opinion, within the sound discretion of the county governing body upon the effective date of Act No. 1170, supra.

Very truly yours,

MacDONALD GALLION

Attorney General

January 21, 1971

Honorable Walker Hobbie, Jr.

Member, House of Representatives

Route 1, Box 384

Montgomery, Alabama 36104

Municipalities—Courts—Costs and Fees—Criminal Law—Motor Vehicles—Opinions Modified, Distinguished and Overruled.

Where violation of city ordinance also constitutes violation of state criminal law and would be misdemeanor, additional $5.00 court cost is imposed.

Opinion by Attorney General Baxley.

Dear Mr. Hobbie:

I have your request for an opinion of this office which is as follows:

"Re: Section 9 of Act 999, 1969 Legislature.

"I would like an opinion from the Attorney General's office in regard to Section 9, Act 999, 1969 Legislature.

"Act 999 sets up the Alabama Peace Officer Annuity and Benefit Fund. Section 9 of Act 999 pertains to the amount of court costs imposed on criminal, quasi criminal and traffic fines where a defendant is adjudged guilty.

"The question I am posing to you is, should the cities in Alabama collect $5.00 from a person adjudged guilty of the violation of a municipal ordinance (criminal)?"

I find that your questions have previously been considered in an opinion rendered to Honorable John F. Watkins, Executive Director, Alabama League of Municipalities, Montgomery, Alabama, Quarterly Report of Attorney General, Volume 137, page 37. This opinion was rendered on November 18, 1969.

I have considered the former opinion of this office and it is my opinion that the conclusion reached, that all violations of city ordinances other than moving traffic violations are not subject to the provision of the Act, should be overruled and your request answered in the affirmative. Section 9, to which you refer states:

"Section 9. Additional Court Costs Imposed; Disposition Thereof. In all criminal and quasicriminal proceedings for the violation of laws of the State or municipal ordinances, except violations of State Conservation laws or regulations, which are tried in any court or tribunal in the State, wherein the defendant is adjudged guilty or pleads guilty or wherein a bond is forfeited and the result of the forfeiture is a final disposition of the case or wherein any penalty is imposed, there is hereby imposed an additional cost of court in the amount of One Dollar ($1.00) for each moving traffic violation, Five Dollars ($5.00) in each such proceeding where the offense constitutes a misdemeanor and Ten Dollars ($10.00) in each such proceeding where the offense constitutes a felony; . . . "

As indicated in the previous opinion, it is abundantly clear that the Legislature intended to include the violation of a city ordinance within the

requirement of the imposition of the additional court costs. The previous opinion stated that the Legislature failed to set up a category within the cost schedule which would cover violations of the city ordinances other than moving traffic violations. However, as noted in the above quoted Section of the Act, the sum of Five Dollars ($5.00) is imposed as additional court costs in each proceeding where the offense constitutes a misdemeanor. Accordingly, it is my opinion that in those instances where the violation of the city ordinance also constitutes a violation of the State criminal laws and would be a misdemeanor under the Code of Alabama, the additional sum of Five Dollars ($5.00) should be imposed.

The opinion heretofore rendered to Honorable John F. Watkins, Executive Director, Alabama League of Municipalities, is hereby modified to conform with this response.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

January 21, 1971

Honorable Harry M. Philpott, President

Auburn University

Auburn, Alabama

Honorable David Mathews, President

The University of Alabama

University, Alabama

Colleges and Universities—Auburn University—University of Alabama—Funds (Athletic Receipts).

1. The Boards of Trustees of Auburn University and the University of Alabama do not have **exclusive** control over the expenditure of athletic receipts.

2. Said athletic fund must be expended for institutional purposes and in the exercise of a reasonable discretion by the said Trustees.

3. Auburn University and the University of Alabama may properly pay from athletic receipts the post-season football game expenses for the official traveling party consisting of the following only:

(a) Immediate members of the Athletic Department who are personally engaged in the preparation for the game because their presence is needed, and their wives.

(b) Individuals who have direct responsibility in policy making of the Athletic Department, and their wives.

(c) Members of the Varsity Squad and their wives.

Opinion by Assistant Attorney General Madison.

Dear Sirs:

Your request for an official opinion, bearing date of December 28, 1970, is as follows:

"The undersigned officers of the State of Alabama, entitled by law to the opinion of the Attorney General, and being officers required to collect, disburse, handle and account for public funds, request your opinion concerning the questions stated below. It is hereby certified that the advice sought is necessary to the performance of an official act which must be immediately performed by us as President of Auburn University and as President of the University of Alabama, both instrumentalities of the State of Alabama, as shown by the facts set out herein.

"Your opinion is requested with respect to the following questions.

"1. Does the power of exclusive management of financial and other interest of the institution vested in the Boards of Trustees of Auburn University and the University of Alabama by the Constitution and Statutes of the State of Alabama include the lawful authority on the part of such boards to determine it to be for a legitimate institutional purpose and in the best interest of the university to pay from non-appropriated institutional funds, such as athletic receipts, the following expenses:

"1. Payment of travel expenses to athletic events, including bowl games, of wives, newsmen, guests and/or friends of the university?

"2. Payment for wrist watches, charm bracelets, blankets or other gift items?

"3. Payment for food and entertainment related to athletic events for newsmen, guests and/or friends of the university?

"2. Does Act No. 470, Acts of Alabama, Regular Session, 1969, impose a restriction on the lawful authority of the boards of trustees of Auburn University and the University of Alabama to authorize payments from non-appropriated funds of each institution?

"It has been the practice of Auburn University and the University of Alabama (and a practice uniformly followed by all universities in the Southeastern Conference), pursuant to authorization of their respective Boards of Trustees, to follow the policy and rule of the Southeastern Conference with respect to payment of certain expenses in connection with athletic events. As to the post-season games, this rule is as follows:

"(h) The official traveling party to a post-season football game, whose expenses are paid by the institution, be limited as follows:

"1. Immediate members of the Athletic Department who are personally engaged in the preparation for the game because their presence is needed, and their wives.

"2. Individuals who have direct responsibility in the policy making of the Athletic Department and their wives.

"3. Members of the varsity squad and their wives.

"The undersigned have been advised by the Chief Examiner, Examiners of Public Accounts, State of Alabama, that some question exists with respect to the lawful authority of the Trustees to follow the practices above described. It is believed that the authority conferred on our Boards of Trustees by Alabama Constitution and Statute includes the lawful authority to establish the policies and practices in question."

Since the request and memorandum refers to the "exclusive management and control of the affairs of Auburn University and the University of Alabama as being vested in their Boards of Trustees" and since some of the prior opinions of this office are of like effect, the following discussion is deemed necessary and proper.

Both Auburn University and the University of Alabama are under "the management and control" of boards of trustees created under the provisions of Section 266 and Section 264 of the Constitution of Alabama 1901.

It is settled law that a state constitution is not a grant but a limitation on legislative power, so that the Legislaure may enact any law not expressly or inferentially prohibited by the Constitution of the state or nation. Alabama Digest, Constitutional Law, Section 26.

In **Denson v. Alabama Polytechnic Institute,** 220 Ala. 433, 126 So. 133, the power of eminent domain was upheld for Auburn because it enjoyed the incidents of sovereignty as an integral part of the state. It was there said:

". . . Such state institutions are a part of the state, and their property is in fact the property of the state. They are held to be immune from suits under the terms of our Constitution

> prohibiting suits against the state, though the charter may expressly provide otherwise . . . ."

By Section 1 of Act No. 89, General Acts 1915, page 133, the corporation styled the Medical College of Alabama was dissolved and the institution was made a part of the Medical Department of the University of Alabama, provided that it should remain in Mobile so long as it could be maintained as a Class "A" school in that city.

In **Stevens, et al. v. Thames,** 204 Ala. 487, 86 So. 77, the court said of said Section 1, supra:

> "It is also urged that Acts 1915, p. 133, violates section 264 of the Constitution, because it attempts to deprive the trustees of the University of Alabama of a discretion as to the management and control of the University. We do not think that the act in question invades the powers of management and control of the trustees, within the provision of section 264, but relates to a matter within the legislative power of the state, and which is not included in the powers of management and control of the trustees, as governed by said section 264 of the Constitution. Nor are we persuaded that the direction to the trustees to act upon a status to be ascertained by the American Medical Association is a delegation of legislative authority . . . ."

In addition, as a state agency, the books, records and accounts of such agency are subject to examination and audit by the Department of Examiners of Public Accounts. Quarterly Report of Attorney General, Volume 76, page 63.

In an opinion reported in Quarterly Report of Attorney General, Volume 134, page 34, this office ruled as to Section 154, Title 41, Code of Alabama 1940, Recompiled 1958, relating to "limitation of per diem expenses" as follows:

> "Both Auburn University and the University of Alabama are institutions of the State and their boards of trustees are mere agents of the State . . . . (Citing cases.)
>
> "The instructors and employees of these two institutions when on traveling business for said institutions are persons traveling in the service of the State of Alabama or its agencies or institutions within the meaning of said Section 154, supra, and said Section is applicable and governs their travel allowance."

It was also ruled that the said statute "does not deal with the **sources** from which the expenses are paid, but instead deals with **amounts** to be allowable to persons traveling in the service of the State of Alabama as its agents, etc.

Although the above Section 154 has been repealed by the provisions of Act No. 470, Acts of Alabama 1969, page 912, this latter Act now governing travel expenses of persons traveling in the service of

the State or its agencies, it is my view that the ruling in Quarterly Report of Attorney General, Volume 134, page 34, supra, is applicable to Act No. 470. Formal Opinion of December 9, 1970, to Honorable T. Raiford Noland, Vice President for Business Affairs, Livingston University, copy enclosed.

The above results in two conclusions by this office: first, that your second question is answered in the affirmative, and secondly, that the Boards of Trustees of Auburn University and the University of Alabama do not have the **exclusive** management and control of non-appropriated institutional funds, such as athletic receipts. Quarterly Report of Attorney General, Volume 19, page 55; Formal Opinion to Honorable T. Raiford Noland, supra.

Any expressions in former opinion contrary to the above two rulings are hereby expressly rejected.

Questions 1, 2, and 3 are much too broad. I have not been informed as to what travel expenses are involved or the athletic events other than bowl games which are contemplated. I do not know who the wives are or the number involved. The same is true as to the friends and/or guests of the universities. It is common knowledge that each has thousands upon thousands of friends.

To whom and for what purpose are wrist watches, charm bracelets, and other gift items to be given?

What athletic events are involved in Question 3, and who are the guests and friends of each university, and what entertainment is to be provided?

Some of the opinions of this office are as follows:

1. A public agency or institution of the State may not expend auxiliary funds, such as vending machine and student activity receipts for holiday greeting cards. Quarterly Report of Attorney General, Volume 129, page 27.

2(a). Funds received by Jefferson State Junior College from student activity fees may not be used or expended for a "Student Personnel Coffee Fund."

(b). Funds received from late examination fees or charges may not be used or expended to maintain a coffee and refreshment center in the faculty lounge. Quarterly Report of Attorney General, Volume 130, page 30.

3. Local school money could not be used to buy fountain pens for faculty members. There the money was raised by selling school pictures in the classrooms.

4. A county board of education may not pay for a gift or plaque or gift watch to a retiring teacher; nor for flowers for the funeral of

a teacher or members of the teacher's immediate family; nor while the teacher is hospitalized.

5. Hospital authorities could not give bank notes to employees at Christmas time for morale or any other purpose. (Opinions are cited in Volume 130, page 30, as to 3, 4, and 5.)

It is true that the Trustees of Auburn University and the University of Alabama have broad discretionary power in the expenditure of athletic receipts. The expenditure, however, must be for a legitimate institutional purpose and must not offend constitutional or statutory provisions. It is also true that the exercise of discretion must be reasonable. It is not an arbitrary discretion or one arrived at in the belief that the athletic receipts may be expended in any manner the institutions desire.

I cannot give blanket approval to Questions 1, 2, and 3. It is my opinion though that payment of expenses from the athletic receipts for the following is reasonable and proper expenditure for post-season football games.

1. Immediate members of the Athletic Department who are personally engaged in the preparation for the game because their presence is needed, and their wives.

2. Individuals who have direct responsibility in policy making of the Athletic Department, and their wives.

3. Members of the varsity squad, and their wives.

Yours very truly,

WILLIAM J. BAXLEY

Attorney General

January 21, 1971

Honorable A. W. Steineker, Jr.

Chief Examiner

Department of Examiners of Public Accounts

Montgomery, Alabama 36104

Schools—Bids—County Board of Education—Disposal of Personal Property—Act No. 473, 1969 Session of the Legislature.

County Boards of Education are not subject to the provisions of Act No. 473 of the 1969 Session of the Legislature

and are not required to sell tangible personal property owned by them on competitive bids.

Opinion by Assistant Attorney General McQueen.

Dear Sir:

Your request for an official opinion, bearing date of October 23, 1970, is as follows:

"It has been the interpretation of this department since the passage of Act No. 473, Acts of Alabama 1969, page 927, that the act was applicable to county boards of education.

"Two recent opinions from your office indicate that you do not concur with this view. They are the opinion to Honorable J. R. Pittard, Superintendent, Talladega County Board of Education, dated September 30, 1970, and the opinion to me dated August 4, 1970.

"The reasons for our interpretation are:

"1. Section 1 of Act No. 473, supra, requires the sale or disposal of personal property owned by the State of Alabama 'by, or on behalf of, the State of Alabama, or any **department, board, bureau, commission, institution, corporation or agency thereof'** to be competitive bid or auction.

"2. Section 3 states that all 'educational and eleemosynary institutions' governed by a board of trustees or similar body shall be governed by the provisions of this act.

"3. The Supreme Court of Alabama has on numerous instances held a county board of education to be 'an **agency, commission, board, institution, or department of the state'** and its funds to be state funds. See, for example, **State v. Brandon,** 244 Ala. 62, 12 So. 2d 319; **Hawkins v. State Board of Adjustment,** 242 Ala. 547, 7 So. 2d 775; **State v. Tuscaloosa County,** 233 Ala. 611, 172 So. 892; and **Williams v. State for Use and Benefit of Pickens County,** 230 Ala. 395, 161 So. 507.

"4. Much of the property owned by various boards of education have been purchased from state appropriations directly made to the local board of education, such as school buses recently purchased by numerous boards from the special conditional capital outlay appropriation distributed under Section 28(e) of Act No. 91, Acts of Alabama 1969, page 135 (page 161).

"This department is presently auditing many county boards of education for the fiscal year ending September 30, 1970 and, in view of the conflict set out above, I would appreci-

ate your opinion as to whether Act No. 473, supra, is applicable to county boards of education."

You call attention to an opinion of this office rendered to Honorable J. R. Pittard, Superintendent, Talladega County Board of Education, under date of September 30, 1970, and an opinion rendered to you under date of August 4, 1970. The opinion written to Mr. Pittard merely holds that county boards of education have no authority to part with surplus school busses or other property without adequate consideration.

I will refer to the letter addressed to you on this subject later on in this opinion.

You set forth the reasons for your interpretation of the act in paragraphs 1, 2, 3 and 4 of your letter. We agree that the matter set forth in your paragraphs 1, 2, 3 and 4 are accurate statements, some of them being taken from the act itself and others being expressions of the Supreme Court of Alabama holding that a county board of education is an agency, board, commission, institution, or department of the State of Alabama, and its funds are state funds. With this statement, we have no quarrel. We likewise agree that much of the property owned by the local board of education has been purchased from State funds appropriated to the various local boards of education.

Admitting all of the above statements, the sole question presented by your request is whether or not the Legislature exempted county boards of education from the purview of Act No. 473, supra.

In the letter addressed to you under date of August 4, 1970, you were specifically advised by this office that this act did not apply to county boards of education as they were exempt from the act by its provisions. I believe that the reasons set forth in the letter to you on August 4, 1970, are good and legal reasons and they are hereinbelow again set out and made a part of this opinion:

> Act No. 217, Acts of 1967, Page 259, is codified as Title 55, Section 507, et seq., Code of Alabama 1940, Recompiled 1958. Act No. 473, Acts of 1969, Page 927, is codified as Title 55, Section 521, et seq., Code of Alabama 1940, Recompiled 1958.

Your attention is invited to Title 52, Section 71, Code of Alabama 1940, Recompiled 1958, which reads as follows:

> "All the property, estate, effects, money, funds, claims, and donations now or hereafter vested by law in the public school authorities of any county for the benefit of the public schools of any county are hereby transferred and vested in the county board of education, and their successors in office.
>
> Real and personal estate granted, conveyed, devised or bequeathed for the use of any particular county, school district,

> or public school, shall be held in trust by the county board of education for the benefit of any such county school district or school."

Your attention is also invited to the provisions of Title 52, Section 99, Code of Alabama 1940, Recompiled 1958, which are as follows:

> "The county board of education shall have the right to acquire, purchase by the institution of condemnation proceedings if necessary, lease, receive, hold, transmit and convey the title to real and personal property for school purposes. It may sue and contract all contracts to be made after resolutions have been adopted by the board and spread upon its minutes. All processes shall be executed by service on the executive officer of the board."

You will note that Title 52, Section 71, supra, provides that all the property vested by law in the public school authorities of any county for the benefit of the public schools of the county is vested in the county board of education, and that Title 52, Section 99, supra, gives the county board of education the right to transmit and convey the title to real and personal property for school purposes.

This office has previously ruled that the county board of education is specifically authorized and empowered to transmit and convey the title to real and personal property for school purposes. Quarterly Report of Attorney General, Vol. 22, Page 149; Quarterly Report of Attorney General, Vol. 91, Page 40.

In addition, Title 55, Section 521, supra, in the first sentence thereof specifically exempts school supplies and property used in vocational projects from the application of the law requiring the disposition of tangible personal property by competitive public auction or sealed bids, as well as types of property the disposal of which is otherwise provided for by law. Since the disposal of local school property is otherwise provided for by law, in my opinion, Title 55, Section 521, supra, is not applicable to the situation stated in your letter.

Aside from the above, it is enlightening to note that Act No. 217 of the 1967 Session of the Legislature, requiring the purchase of tangible personal property to be made by competitive bid, specifically included county boards of education, and had the Legislature intended that they be included under the provisions of Act No. 473, supra, it would have been a simple matter for the Legislature to include them.

Yours very truly,

WILLIAM J. BAXLEY

Attorney General

January 22, 1971

Honorable Myrtle Green

Judge of Probate

Madison County Courthouse

Huntsville, Alabama 35804

Courts—Bail—Bonds—Sureties—Judges of Probate—Depositories.

Judge of Probate may approve cash deposit made by bail bonding company in federally insured bank under escrow agreement in lieu of bond with corporate surety as required by Title 15, Section 201, Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General Calhoun.

Dear Madam:

Your request for an opinion of this office, dated December 11, 1970, is as follows:

"Code of Alabama, Title 15, Section 201, provides that 'every person engaged in the business of making bail bonds and charging therefor, . . . , in addition to all other requirements of this section, shall be required to furnish a bond with corporate surety in the amount of $25,000.00, . . ., to be approved by the Probate Judge of each county in which such person engages in such business, conditioned to guarantee the payment of all sums of money that may become due the state or any political subdivision thereof by virtue of any judgment absolute being rendered against said person on a forfeiture of bail.' I am informed that by informal opinions dated March 1, 1968, and March 22, 1968, rendered to Honorable Julian Swift, Clerk, Circuit Court of the Tenth Judicial Circuit of Alabama and Honorable J. Paul Meeks, Judge of Probate, Jefferson County, Alabama, respectively, you stated that the above cited statute could be complied with by posting the required amount of cash in escrow with a local bank conditioned to pay any sum of money that becomes due the state or any of its political sub-divisions by virtue of any judgment absolute being rendered against the bonding company on a forfeiture of bail. In the letter to Mr. Swift you stated, 'it is my opinion that there is no protection better than cash and that such a procedure would be a substantial compliance with the statute and is permissible,' citing **City of Mobile v. Farrell,** 229 Ala. 582, 158 So. 539.

"I respectfully request of you a formal opinion stating that I, as Probate Judge of Madison County, Alabama, may ap-

prove as compliance with Code of Alabama, Title 15, Section 201, in lieu of the required bond with corporate surety in the amount of $25,000.00, an arrangement between those engaged in the bail bonding business and a federally insured bank in the City of Huntsville, Alabama, whereby $25,000.00 in cash is deposited with the bank under an escrow agreement containing the following provision:

> "'**(Name of those engaged in the bail bonding business)** do hereby deliver to **(name of bank)**, in escrow, the sum of $25,000.00 in cash which said sum of money is hereby deposited in special savings account number———— in the name of **(name of bank)**, as escrow agent for **(name of those engaged in the bail bonding business)**. The said bank is hereby authorized to pay from said deposit on receipt of an order of the state of Alabama or any of its political sub-divisions, and said payment is hereby guaranteed to the full amount of said deposit, all sums of money that may become due the State of Alabama or any of its political subdivisions, by virtue of a judgment absolute being rendered against the said **(name of those engaged in the bail bonding business)** on a forfeiture of bail. The aggregate liability of said bank shall not exceed the said $25,000.00 so deposited and the said bank or **(name of those engaged in the bail bonding business)**, or both, may cancel this agreement as to any future liability by giving thirty days written notice of such cancellation to the Probate Judge of Madison County, Alabama. So long as this agreement remains in effect, interest on said sum of money, when due and payable, less escrow agent's annual fee shall be paid by said bank by check to ————————————. This agreement shall not take effect until it is approved by the Probate Judge of Madison County, Alabama.'"

I am of the opinion that an arrangement between a bail bonding company in Huntsville, Alabama and a federally insured bank in Huntsville, Alabama, whereby $25,000.00 in cash is deposited with said bank under an escrow agreement containing the provisions set forth in your letter, is in substantial compliance with the intent of Title 15, Section 201, Code of Alabama 1940, Recompiled 1958, and may be approved by you as being in compliance with said Section 201, supra, in lieu of the required bond with corporate surety in the amount of $25,000.00. This procedure has been previously approved by this office in informal opinions dated March 1, 1968, and March 22, 1968, rendered to Honorable Julian Swift, Clerk, Circuit Court of the Tenth Judicial Circuit of Alabama, and Honorable J. Paul Meeks, Judge of Probate, Jefferson County, Alabama. See also **City of Mobile v. Farrell**, 229 Ala. 582, 158 So. 539.

I trust this answers your inquiry.

Yours very truly,

WILLIAM J. BAXLEY

Attorney General

January 28, 1971

Dr. Stonewall B. Stickney

Commissioner of Mental Health

Department of Mental Health

502 Washington Avenue

Montgomery, Alabama 36104

State and State Departments—Bids—Contracts— Mental Health Board—Purchasing Agent.

1. Alabama Mental Health Board and Department purchases are subject to provisions of the Competitive Bid Law, Title 55, Section 494, Code of Alabama 1940, Recompiled 1958, and Public Works Statute, Title 50, Section 15(1).

2. Alabama Mental Health Department is not required to get competitive bids on purchases not covered by Title 55, Section 494, or Title 50, Section 15(1).

Opinion by Assistant Attorney General Wood.

Dear Sir:

Your request for an official opinion dated November 25, 1970 is as follows:

> "Your formal opinion is requested concerning Title 22, Section 318(7) which reads:
>
> " 'All purchases and construction and supply contracts of the department shall be made or let on a competitive bidding basis, and may be made through the state purchasing agent or otherwise, as the Alabama Mental Health Board may direct. No purchases, except for rights-of-way, shall be made from nor shall any sales be made to any member of the legislature, any member of the Mental Health Board, hereby created, or any other person holding an office of profit with the State of Alabama.'
>
> "Attached is James Webb's unofficial memorandum opinion to Mr. Steineker concerning the legal effect and legislative

intent of this provision of the Code. Mr. Wood, our attorney, agrees with Mr. Webb's interpretation. However, for the legal protection of the responsible officers of the Department of Mental Health your formal opinion is necessary."

The opinion, referred to above, written by Assistant Attorney General Webb to Honorable A. W. Steineker, dated November 6, 1970, is as follows:

"You have requested my opinion as to whether the Mental Health Department must let all purchase contracts on the basis of competitive bidding or should just those over $500.00 be let on competitive bid under provisions of the competitive Bid Law, Title 55, Section 494, Code of Alabama, Recompiled 1958.

"The problem arises from the wording of Title 22, Section 318,(7), Code of Alabama, Recompiled 1958 (1969 Cumulative Pocket Parts). This section reads in pertinent part as follows: " 'All purchases and construction and supply contracts of the department shall be made or let on a competitive bidding basis, and may be made through the state purchasing agent or otherwise, as the Alabama Mental Health Board may direct.'

"In my opinion this section requires compliance by the Mental Health Department with the competitive bid law in Section 494, Title 55, supra, and the provisions of the Public Works Statute, Title 50, Section 15(1), Code of Alabama, Recompiled 1958 (1969 Cumulative Pocket Part). I do not believe that this section was intended to require competitive bidding on every item purchased by the department but only on those items required to be purchased under competitive bidding by the Competitive Bid Law."

The wording of Title 22, Section 318(7) indicates the intent of the Legislature that the State Competitive Bid Law has set out in Title 55, Section 494, Code of Alabama 1940, Recompiled 1958, and the provisions of the Public Works Statute, Title 50, Section 15(1), Code of Alabama 1940, Recompiled 1958, are applicable to the Department of Mental Health and are to be used as a standard. Section 318(7) further states " . . . and may be made through the state purchasing agent or otherwise, as the Alabama Mental Health Board may direct."

Had it been the intent of the Legislature to make the earlier language of Section 318 mandatory, then the disjunctive word "or" would have been used rather than the conjunctive "and."

Therefore, the Alabama Mental Health Department should make all purchases in compliance with the provisions of Title 55, Section 494 and Title 50, Section 15(1), Code of Alabama 1940, Recompiled 1958.

In order to further support the purchasing procedures of the Alabama Mental Health Department, it is suggested that a formal resolution of the Alabama Mental Health Board be passed instructing the Department's Purchasing Agent to comply with the State Bid Laws and Public Works Statute where applicable and to use his best business judgment in all other purchases.

Yours very truly,

WILLIAM J. BAXLEY

Attorney General

February 8, 1971

Honorable Charles A. Boswell

Commissioner of Revenue

Department of Revenue

Administrative Building

Montgomery, Alabama

Taxation—Revenue, Department of—Counties—Sales Tax—Use Tax.

The State Department of Revenue does not have authority to collect sales and use taxes for a county levying such taxes under the provisions of Act No. 688, Acts of Alabama 1969, Volume 2, page 1226.

Opinion by Assistant Attorney General Livingston.

Dear Sir:

Your request for an official opinion dated January 29, 1971, is as follows:

> "Act No. 688, Acts of Alabama 1969, Volume 2, page 1226, authorizes the governing body of each of the several counties to levy and provide for the assessment and collection of franchise, excise and privilege license taxes with respect to privileges or receipts from privileges exercised in such county.
>
> "The question has been raised and your official opinion is requested as to whether or not the State Department of Revenue has the authority to collect sales and use taxes for a county levying such taxes under the provisions of Act No. 688, supra."

Your question is answered in the negative.

Act No. 688, supra (Title 51, Section 831(3), Pocket Part, Code of Alabama 1940), authorizes the governing body of each county to levy and provide for the assessment and collection of the taxes referred to in your request. The Act contains no provisions whereby the State Department of Revenue is authorized or directed to collect such taxes for a county under any circumstances.

It is significant to note that the same Legislature which passed Act No. 688 also enacted Act No. 917, Acts of Alabama 1969, Volume 2, page 1653, which authorizes the governing body of all incorporated cities and towns to levy sales and use taxes parallel to the state levy of such taxes except as to rate. Act No. 917 also authorizes the governing body of a municipality to pass an ordinance or resolution requiring the State Department of Revenue to administer and collect for such municipality the taxes levied and assessed under the provisions of the Act. Had the Legislature intended for the Department of Revenue to have authority to collect the taxes levied by a county under Act No. 688, it could have so provided in the Act as it did in Act No. 917, supra. The Department of Revenue does legally collect sales and use taxes for sixteen counties. However, the levy for each of the sixteen counties is made by a Local Act of the Legislature which specifically directs the Department of Revenue to collect such taxes for such county. See also Act No. 203, Acts of Alabama 1965, First Special Session, page 272, as amended by Act No. 176, Acts of Alabama 1969, Special Session, Volume 1, page 242, which also authorizes the Department of Revenue to collect license taxes levied by municipalities.

It has been suggested that the Department of Revenue has such authority in view of the provisions of Title 51, Section 131(a), Code of Alabama 1940, which provides as follows:

> "§131. Powers and duties of department.—It shall be the duty of the department of revenue, and it shall have the power and authority, in addition to the authority now in it vested by law. (a) To have and exercise general and complete supervision and control of the valuation, equalization and assessment of property, privilege, or franchise, and of the collection of all property, privilege, license, excise, intangible, franchise or other taxes, for the state and counties, and of the enforcement of the tax laws of the state, and of the several county tax assessors, and county tax collectors, probate judges, and each and every state and county official, board or commission charged with any duty in the enforcement of tax laws, to the end that all taxable property in the state shall be assessed and taxes shall be imposed and collected thereon in compliance with the law, and that all assessments on property, privileges, intangible, and franchises in the state shall be made in exact proportion to the fair and reasonable market value thereof in substantial compliance with the law."

The provisions of Section 131(a), supra, were first enacted by the Legislature in the General Revenue Act of 1935, Act No. 194, General Acts of Alabama 1935, page 256 at page 299. At the time Act No. 194 was passed, county sales and use taxes were unknown to the law and it is my opinion that the provisions of Section 131(a), supra, are not applicable to sales and use taxes authorized to be levied by counties in the 1969 law, Act No. 688, supra. Furthermore, a careful reading of Section 131(a), indicates that the provisions thereof relate to property tax and equalization so that "all taxable property in the state shall be assessed and taxes shall be imposed and collected thereon in compliance with the law and that all assessments on property, privileges, intangibles, and franchises in the state shall be made in exact proportion to the fair and reasonable market value thereof in substantial compliance with the law." (Emphasis added.) Such language is not applicable to sales and use taxes.

Therefore, it is my opinion that the State Department of Revenue does not have the authority to collect sales and use taxes for a county levying such taxes under the provisions of Act No. 688, supra.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

February 10, 1971

Honorable Claude D. Kelley

Director of Conservation

State of Alabama

Administrative Building

Montgomery, Alabama 36104

State and State Departments—Conservation Department—State Lands—Bids—Timber.

The sale of standing timber from school or swamp and overflowed lands by the Department of Conservation, Division of Lands, should be in accordance with the provisions of Title 8, Section 239, Code of Alabama 1940, Recompiled 1958.

Opinion by Assistant Attorney General O'Rear.

Dear Mr. Kelley:

Your request of January 20, 1971, for an official opinion of this office, is as follows:

"Your official opinion is requested on the following:

"Title 55, Section 521, Code of Alabama, Recompiled 1958, as amended, provides in part that the sale of standing timber owned by the State of Alabama may be sold provided the transaction is initiated by competitive sealed bids. This code section was passed by the Legislature in 1969.

"Beginning in line 3 of this section there is an apparent exception to those properties for which there is otherwise provided a law for such sale.

"Title 8, Section 239, Code, supra, provides the procedure for the sale of timber or minerals from school or swamp or overflowed lands. This section provides for sale by competitive bid.

"As you will note from Title 8, Section 239, supra, the Department of Conservation is charged with the responsibility of sales pertaining to those lands described in the section.

"Please advise whether or not the Department should, on future sales of standing timber from school or swamp or overflowed lands, conduct such sales under the provisions of Title 55, Section 521, or Title 8, Section 239."

I have carefully read the provisions of both Title 8, Section 239, Code of Alabama 1940, Recompiled 1958, and Title 55, Section 521, Code of Alabama 1940, Recompiled 1958, as amended, both of which are closely related in reference to the sale of timber. The obvious legislative intent in both statutes was to insure open competitive bidding and the prevention of favoritism or collusion in the sale of public property, including standing timber. Both statutes require (with certain exceptions not germane to this question) the public advertisement of property to be sold with the taking of sealed bids and the sale to the highest bidder only. The only major difference in the two statutes is that Title 55, Section 521, requires the approval of sales by the Director of Finance, while Title 8, Section 239, requires the approval of sales by the Director of Conservation.

Title 55, Section 521, which was the later enacted of the two statutes, in question, provides certain exclusions from its provisions, a portion of which section setting out these exclusions, I quote as follows:

"All contracts of whatever nature for the sale or disposal of tangible personal property or standing timber owned by the state of Alabama, other than alcoholic beverages, products of the Alabama Institute for Deaf and Blind, barter arrangements of the state prison system, books, school supplies, food, property used in vocational projects, and **types of property the disposal of which is otherwise provided for by law . . .**

made by, or on behalf of the state of Alabama . . . shall be let by free and open competitive public auction or sealed bids . . . . "

Title 8, Section 239, as amended, was enacted several years prior to the requirements of sale set out in Section 521, supra, and had, therefore, previously provided a statutory means for the disposal of timber on school or swamp and overflowed lands by public advertisement and the taking of sealed competitive bids. In my opinion, therefore, a method for the sale of timber from school and swamp and overflowed lands had already been provided for by law and such sales would not come under the provisions of Title 55, Section 521, supra. The sale of timber from school and swamp and overflowed lands, under the provisions of Title 8, Section 239, Code of Alabama 1940, Recompiled 1958, as amended, is the proper statutory procedure to be used by the Division of Lands of the Department of Conservation in the sale of such product.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 8, 1971

Honorable Richard L. Smith

Secretary

Policemen and Firefighters Pension and Relief Fund Board

City of Mobile

Mobile, Alabama

Municipalities—Retirement—Police & Firemen.

1. City policemen may not cease retirement contributions and continue to stay on active status.

Opinion by Assistant Attorney General Gish.

Dear Mr. Smith:

Reference is made to your request of February 16, 1971 for an opinion of this office, which reads as follows:

"A Mobile Police Patrolman, one S. B. Waltman, has filed a request with the Policemen and Firefighters Pension and Relief Fund Board for the reimbursement of all monies paid into the Pension Fund by Mr. Waltman, and has notified the Board of his election not to come within the provisions of the Act.

"A copy of the request and election by Mr. Waltman is attached hereto.

"Mr. Waltman was employed as a Police Patrolman by the City of Mobile on April 16, 1967. At the time of his employment, he did not make any election concerning his participation in the Pension Fund, and therefore there have been deducted from his salary the amounts authorized by the Pension Fund Act.

"Mr. Waltman proposes to continue as an employee of the Mobile Police Department, but has elected that he not be covered by the provisions of the Pension and Relief Act.

"Your official opinion is therefore requested upon the following:

"1. Is Mobile Police Patrolman, S. B. Waltman, lawfully entitled to continue as a member of the Police Department, and withdraw from the Pension and Relief Fund all prior contributions made to the Fund by Mr. Waltman?"

The Pension and Relief Fund to which you refer was established and is controlled by Act No. 243, Acts of Alabama 1964, page 326.

Section 22 of said statute provides that a member of the Police Department of the City of Mobile may elect at any time not to come within the provisions of the statute. After such an election is made no part of the salary of such member may be deducted for the Pension and Relief Fund.

Section 16(d) of Act No. 243 supra, reads, in part, as follows:

"Whenever the employment of a member of the Police or Fire Department of the City shall be terminated by death or for any other reason before eligibility for benefits has been established, the contribution of such employee to the Fund shall be refunded in lump sum without interest to the employee, his widow or children, a named beneficiary, or to his estate, as the case may be. . . . "

We find no provision for a refund of contributions made by an employee to the Pension and Relief Fund except as provided in the above-quoted portion of the statute. You will note that such a refund is contingent upon the termination of the employment of the member.

Therefore, your question is answered in the negative.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 11, 1971

Mr. Billy J. Duncan, Chairman

Walker County Commission

Jasper, Alabama

Counties—Taxation—Walker County—Gasoline Tax.

1. Diesel fuel is exempt from Walker County Gasoline Tax.

Opinion by Assistant Attorney General Livingston.

Dear Mr. Duncan:

Your request for an opinion dated March 8, 1971 is as follows:

> "The Walker County Commission felt that some gasoline taxes were escaping from outlying service stations, so a firm was employed to make a check for us. We had heard that Blount County had undertaken this project and had netted them several thousand dollars.
>
> "Mr. E. C. Frazer, Jr., Department of Public Examiners explained to us that Blount County was under a Local Act with the provision to collect their own tax, that Walker County was under Local Act #495, approved August 22, 1951, for the State to collect for Walker County, and that this would be an illegal expenditure.
>
> "We called the Gasoline Tax Division and they said, we should contact them and furnish them with the names that we thought were not making correct reports and they would report to us.
>
> "Our question is, would it be legal for Walker County to employ a private firm to make this check for us.
>
> "Our second question is, under this Act #495, could this also apply to Diesel Fuel as well as to Gasoline Tax."

The Walker County gasoline tax is levied by Act No. 495, Acts of Alabama 1951, Volume 1, page 880. Section 2 of Act No. 495, provides as follows:

> "Section 2. The said additional tax of one cent a gallon shall be collected by the State Department of Revenue in the same way and manner and at the same time that it collects gasoline taxes under Sections 646 to and including Section 665, of Title 51 of the 1940 Code of Alabama, as amended, and all remedies and powers provided by said Sections 646 to and including Section 665 shall apply to the enforcement of the collection of the additional tax levied by this Act, and all the provisions of said Sections with reference to the filing of re-

ports, examination of books, and penalties shall apply to the additional levy made by this Act."

In view of the provisions of section 2 quoted above, it is apparent that the full responsibility of collecting the Walker County gasoline tax has been given to the State Department of Revenue by the legislature. The Walker County Commission is charged with no duty concerning the collection of the county gasoline tax. In the case of **Bice v. Foshee,** 19 Ala. App. 421, 97 So. 764, the Court stated:

> "County boards, in the absence of legal authority to do so, cannot employ agencies to exercise powers beyond the powers granted them by law. Neither is it within the power of a county board to contract with a person to perform acts which are part of the official duties imposed by law on other officers of the county or state."

State ex rel. Towle v. Stone, 236 Ala. 82, 181, So. 281, is very much in point. In this case, the Mobile County Board of Revenue employed the petitioner to investigate the appraisal of taxable property and the constantly declining valuation of the property in the county. In holding that the County Board of Revenue had no authority to employ the petitioner for such purpose, the Supreme Court stated:

> "Following earlier decisions, the established rule is stated in Board of Revenue and Road Com'rs of Mobile County v. State ex rel. Drago, 172 Ala. 155, 54 So. 995, in the following language: 'The law of this state (however it may be in other jurisdictions) is long and well settled that counties are governmental agencies of the state, and that they are therefore chargeable with and liable for those claims or demands—and those only—which the law imposes upon them, 'or empowers them to contract for. No officer can charge the county with the payment of any claim due him, however, meritorious or whatever benefit the county may derive therefrom, unless expressly or by necessary implication authorized by law. . .'
>
> "Here it is clear enough the Board of Revenue as such is charged with no duty concerning the matter of property valuation for taxation purposes, which was imposed upon the Board of Review, the other tribunal and a quasi judicial body created for that specific purpose. Gen. Acts 1923, p. 179 et seq. And it is not pretended the Board of Review made any such employment, or had authority to do so.
>
> "And as to the Board of Revenue, it is not pretended that it possessed any express authority to make such a contract. But the insistence is that the power is necessarily implied, and much argument is made as to the necessity for revenue, 'the lifeblood of government' (Clark v. Eagerton, et al., 207 Ala.

491, 93 So. 455, 457), and the duty of the county to protect its revenue at its source.

"The argument is plausible, but, in our opinion, is not supported by the cited authorities, and is not in harmony with the above-quoted established rule in the State . . . .

"The matter of adjustment of tax valuation rested with the Board of Review. Neither the county nor its Board of Revenue were delegated any duty or authority in relation thereto. Incidentally, of course, the county had an interest. But there was no duty imposed concerning this adjustment. However, we forego further discussion.

"There being no duty imposed or authority conferred in relation to the work before the Board of Review, no implied power can follow, and the trial court correctly so ruled."

(The County Board of Review was the predecessor of the present County Board of Equalization.)

Based on the above authorities, it is my opinion that it would not be legal for Walker County to employ a private firm to make the investigation referred to in your request.

I assume that your second question is whether or not diesel fuel is subject to the tax levied by Act No. 495, supra. Section 1 of Act No. 495, provides, in part, as follows:

"Section 1. That in addition to all other taxes and licenses there is hereby levied and every distributor, refiner, retail dealer or storer of gasoline in Walker County, Alabama, as they are defined by Section 646 of Title 51 of the 1940 Code of Alabama, shall collect and pay over to the State Department of Revenue, for the use of Walker County, Alabama, an excise tax of one cent per gallon upon the selling, distributing, storing, or withdrawing from storage in said County for any use gasoline as defined in said Section; . . . "

Title 51, section 646, Code of Alabama 1940, provides, in part, as follows:

"§646. Definitions. As used in this article, the term 'gasoline' shall include gasoline, naphtha and other liquid motor fuels or any device or substitute therefor, commonly used in internal combustion engines; provided, however, that nothing in this article shall be held to apply to those products known commercially as 'kerosene oil,' 'fuel oil,' or 'crude oil' when used for lighting, heating or industrial purposes. . . "

From the above definition of "gasoline" and the exceptions therefrom, it would appear that diesel fuel is included in section 646, supra.

However, diesel fuel is now taxed under a separate statute, Title 51, section 665(1), et seq, Code of Alabama 1940 and has been since 1939.

Section 646, supra, was enacted in 1935. Section 665(1), supra, was enacted in Act No. 590, Acts of Alabama 1939, page 958 and defines "motor fuel" as including "diesel oil." The effect of Act No. 590 was to remove diesel fuel from the provisions of section 646 and this has been so since August 1, 1940, the effective date of Act No. 590. The Walker County gasoline tax levy, Act No. 495, supra, became effective August 22, 1951. Had the legislature intended for the Walker County levy in Act No. 495 to include diesel fuel, it could have levied the tax on motor fuel as defined in section 665(1), supra, (Act No. 590, supra) as well as on gasoline as defined in section 646, supra.

Act No. 57, Special Session 1956, Volume 1, page 86, as amended by Act No. 626, Acts of Alabama 1959, Volume 2, page 1530, which levies the fuel tax for Blount County, specifies that the levy is on the selling, distributing, storing or withdrawing from storage in Blount County for any use gasoline, kerosene or **diesel fuel.** The legislature could have been as specific in the levy for Walker County.

Therefore, since diesel fuel has in effect been removed from the definition of "gasoline" in section 646 by Act No. 590, supra, it is my opinion that the selling, distributing, storing or withdrawing from storage of diesel fuel in Walker County is not subject to the gasoline tax levied by Act No. 495, supra.

It is my understanding that the State Department of Revenue has administered Act No. 495, supra, in accordance with the conclusion stated above since the Act became effective on August 22, 1951. See **State v. Southern Elec. Generating Co.** 274 Ala. 668, 151 So. 2d 216, concerning administrative construction of long standing.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 16, 1971

Honorable Bryan McAfee

Morgan County Judge of Probate

P. O. Box 848

Decatur Alabama 35601

Costs & Fees—Judges of Probate—Corporations.

A five dollar fee for amending Corporate Charter outlined.

Opinion by Assistant Attorney General Tyson.

Dear Judge McAfee:

Your recent request for an official opinion of this office is as follows:

> "Will you please advise me your opinion on the following:
>
> "When new corporations are filed, I charge an examination fee of $2.50. I also charge an examination fee of $2.50 when an instrument is filed increasing the capital stock.
>
> "The question is, should I charge an examination fee when an instrument is filed decreasing the capital stock, changing the name of the corporation, or extending the life of the corporation."

Your attention is directed to the provisions of Title 10, Sections 21(18)—21(23), Code of Alabama 1940, Recompiled 1958, as amended 1963. Specifically, the provisions of Title 10, Section 21(21), in pertinent part, provide "Upon the filing of an amendment to a certificate of incorporation to increase the capital stock of the corporation there shall be paid to the probate judge . . . for filing such statement there shall be paid, in advance, to the probate judge, for the use of the state, a fee of five dollars."

The above section relates back to Section 21(13). It is therefore our opinion that the appropriate fee for decreasing the capital stock, changing the name of the corporation, or extending the life of the corporation should be a fee of five dollars in accordance with the above quoted Code section. It should be noted, however, that all of the foregoing could be accomplished in one amendment. If, however, more than one such amendment be filed, then you are entitled to a fee of five dollars for each such amendment.

I trust this answers your inquiry.

Cordially, yours,

WILLIAM J. BAXLEY

Attorney General

March 16, 1971

Honorable John F. Watkins

Executive Director

Alabama League of Municipalities

Post Office Box 1270

Montgomery, Alabama 36102

Costs and Fees—Courts—Municipalities—Recorder's Court.

The applicability of the imposition by recorders of court costs prescribed by Section 9 of Act No. 999, Acts of Alabama 1969, page 1855, discussed generally.

Opinion by Assistant Attorney General Gish.

Dear Sir:

Your request for an official opinion dated Febrauary 4, 1971, is as follows:

"Since the issuance of your opinion of January 22, 1971, construing Act No. 999, 1969 Acts, we have had numerous inquiries from officials of municipalities over the state and I respectfully request that you clarify the opinion. The opinion states: 'Accordingly, it is my opinion that in those instances where the violation of the city ordinance also constitutes a violation of the State criminal laws and would be a misdemeanor under the Code of Alabama, the additional sum of Five Dollars ($5.00) should be imposed.' This is the sentence which is causing concern to the Recorders of our municipalities.

"I call your attention to the fact that many muncipalities, in an effort to proscribe certain actions found to be offensive but which are peculiar to the locality, have adopted ordinances prescribing a penalty for the commission of such proscribed actions. These ordinances impose penalties but are not, in many instances, covered by any State criminal law.

"Many municipalities have adopted a catchall provision somewhat as follows, as quoted from the Code of the City of Montgomery, Alabama, 1964, to-wit:

"'Section 1-8. **Violations of State Law Made Offenses in City.** It shall be unlawful for any person to commit any offense in the city which is declared by a law of the state to be a misdemeanor.'

"As you know, some municipalities have Recorders who are not attorneys and it will be most difficult for them to determine if a city ordinance also constitutes a violation of the State criminal laws.

"For the above reasons, I request that your opinion be clarified and that you answer the following for the guidance of the Recorders:

"1. Is the imposition of additional costs under Act No. 999, 1969 Acts, required only on those proceedings which result

in a conviction and which are laid under the so-called catch-all ordinances, a specimen of which is set out above?

"2. If your answer to #1 above is in the negative, then will you advise whether or not there is an imposition of additional costs on those convictions arising out of an ordinance peculiar to a local situation and the offense is not characterized as offense under the State criminal laws?

"3. In view of the fact that some of the Recorders are not learned in the law, would you list those offenses which, when resulting in a conviction in a municipal court, require the imposition of the additional $5.00 costs?

"4. If you elect not to answer question #3 above, would you, in reply to this request, set forth guidelines for use by the Recorders in making a determination as to the necessity for imposing the $5.00 court costs?

The opinion to which your request refers was rendered on January 22, 1971, to Honorable Walker Hobbie, Jr., Member of the House of Representatives. Section 9 of Act No. 999, Acts of Alabama 1969, page 1855, is quoted in said opinion.

As your request points out, we advised in the opinion to Mr. Hobbie that in those instances where the violation of a city ordinance constitutes a violation of the State criminal laws and would be a misdemeanor under the Code of Alabama 1940, additional court costs should be imposed by the municipal recorder in accordance with the provisions of Section 9 of Act No. 999, supra.

Title 1, Section 7, Code of Alabama 1940, reads as follows:

> "A felony within the meaning of this Code, is a public offense which may be punished by death, or by imprisonment in the penitentiary; all other public offenses are called misdemeanors."

The Supreme Court of Alabama has held that a municipality may adopt an ordinance which makes municipal offenses of the violation of misdemeanor statutes of this State. See **State v. Town of Springville,** 220 Ala. 286, 125 So 387.

Where a municipality has adopted such an ordinance, the recorder must impose the additional costs, here considered, in a case where a person is convicted under such ordinance. The recorder must also impose such costs upon a person convicted of any other municipal ordinance if the offense constitutes a misdemeanor under State law.

Where a person is convicted under an ordinance prescribing an offense which does not constitute a misdemeanor, such costs may not be imposed. Examples of this type offense are the violations of zoning and building permit ordinances.

A list of misdemeanors by name would be of little vaue since each case must be decided on its own facts, and the elements of the particular offense must be determined from the statute describing such offense.

Both in enforcing a municipal ordinance of the type quoted in your request and in determining whether costs must be assessed under Act No. 999, supra, the municipal recorder has the task of determining whether the offense should be classed as a misdemeanor. The recorder must be guided by the provisions of Title 1, Section 7, supra, in these tasks. He will be aided by reading the annotations found under Title 1, Section 7, supra. If a municipal recorder is in doubt as to a particular offense being a misdemeanor, he may also seek aid from the City Attorney, as well as other attorneys within the community. This office will also help a recorder upon request if he is in doubt in regard to a particular case.

Of course, the final determination as to whether the additional court costs required by Act No. 999, supra, must be imposed is a judicial decision which must be left to the recorder.

We trust that the above discussion answers the specific questions propounded by you.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 19, 1971

Miss Edna M. Reeves

Director

State Agency for Social Security

Montgomery, Alabama 36104

State and State Depts.—State Social Security Agency—Trusts & Trustees—Fiduciaries.

1. State Social Security Agency may invest in certificates of deposit & U.S. Treasury bills.

Opinion by Assistant Attorney General Clark.

Dear Miss Reeves:

I have your letter of February 22, 1971, which reads as follows:

"I am requesting your opinion on our proposed investment program to be instituted in accordance with The Governor's Executive Order Number 3. The following information is submitted in this connection.

'Under date of March 28, 1967 this Agency received an opinion from the Attorney General regarding the investment of social security contributions collected under the provisions of Title 55, Sections 479, and 480, Code of Alabama 1940, as amended, and held in the contribution fund provided for in Section 481.

"Since our law is silent on type of investments, your opinion is requested as to whether or not this Agency, pursuant to Executive Order Number 3, dated February 3, 1971, may invest in Certificates of Deposits and U. S. Treasury Bills in order that interest may be earned.

"We have another Board meeting on February 26 and shall appreciate your opinion on the question of type of investments this Agency may make.

"For your reference the opinion referred to in paragraph one may be found on page 44, Quarterly Report of the Attorney General of Alabama for the period January 1, 1967 through March 31, 1967."

This office ruled in an opinion reported in Quarterly Report of Attorney General, Vol. 126, page 44, that the Social Security Agency had authority to invest its funds, under the provisions of Title 55, Section 481, Code of Alabama 1940, Recompiled 1958.

Section 481, supra, is silent as to the method and type of investments to be allowed of the contribution fund established. However, the State Treasurer shall be Ex-Officio Treasurer and Custodian of the contribution fund and shall administer such fund in accordance with the provisions of the chapter creating the Social Security Agency and the direction of the State. As I understand, the funds are kept separate and apart from other state funds and are not placed on deposit in the State Treasury until after all contributions are received by the agency. As I further understand the situation, it is the fund not on deposit in the State Treasury that the Social Security Agency now desires to invest under the provisions of our prior opinion in accord with an executive order of the Governor.

There are, of course, certain restrictions on the State Treasurer insofar as investment of state funds on deposit. However, the restriction on such deposits, contained in Section 226(2) of Title 55, Code of Alabama 1940, Recompiled 1958, pertains only to those funds held in the State Treasury. As previously stated, the contribution fund referred to in your letter is not on deposit in the State Treasury but, rather is held by the Treasurer as Custodian of the Social Security Administration until all such amounts have been received, at which time the amount is deposited in the State Treasury.

In view of the fact that Title 55, Section 481, supra, and other sections dealing with the Social Security Administration fails to con-

tain any provision directing the type of investments of surplus funds such as is required by Title 55, Section 226(1), supra, I am of the opinion that the Social Security Agency would be acting as one acting in a fiduciary capacity and such investments should, therefore, conform to laws providing for investment of trust estates as set forth in Chapter 5 of Title 58, Code of Alabama 1940, Recompiled 1958. Cf. Quarterly Report of Attorney General, Vol. 136, page 7.

The investments stated in your letter do conform with the provisions of Section 47 of Chapter 5, Title 58, supra, and I am therefore, of the opinion that the Social Security Agency may, pursuant to Executive Order No. 3 invest in certificates of deposit and U. S. Treasury bills.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 22, 1971

Honorable Ralph W. Adams

President

Troy State University

Troy, Alabama 36081

State and State Departments—Colleges & Universities—Troy State University—Expenses.

State employee not living at base station, may not receive travel allowance.

Opinion by Assistant Attorney General Lawley.

Dear Sir:

This letter is in response to your letter dated February 19, 1971 which is as follows:

"Your official opinion is requested on the following matter:

"May a person employed by Troy State University only to teach evening courses at its Fort Rucker branch, and whose place of residence is Troy, Alabama, but whose place of full-time regular employment is Dothan, Alabama, be paid the

mileage allowance authorized by Title 55, Section 488(3), Code of Alabama, for his travel from Troy to Fort Rucker and return, or would the mileage authorization be limited just to the travel performed in deviating from the route between his home in Troy and his regular place of employment in Dothan?

"The University has for some years paid mileage between Troy and Fort Rucker to its faculty members employed on the main campus in Troy who agree also to teach courses in the evening at Fort Rucker. In this case, these are full-time University employees and their regular place of employment is at the main campus in Troy. However, we are in doubt as to what mileage allowance can be paid in the situation outlined in the previous paragraph.

"Your early attention to this matter will be appreciated."

I am of the opinion that the Troy State University employee in question cannot be paid mileage allowance authorized by Title 55, Section 488, Sub-section 3, Code of Alabama, Recompiled 1958. This office held in Quarterly Report of the Attorney General, Volume 129, page 42, that a state employee cannot live in a place other than the place of his permanent base station and receive travel expense to the place of his base station. This opinion held that an official station or base "means in ordinary business parlance a building or place, usually an office building, but not always, which is considered by both employee and superior to be the place of assignment from which will emanate the work of the employee, where he will receive orders and directions as to the carrying out of his duties, where he will make his reports, and where, generally, he receives his pay."

The employee in question performs his services for Troy State University entirely at its Fort Rucker branch, therefore, Fort Rucker is this employee's official station or base. The fact that he resides in Troy and has regular employment in Dothan does not alter the fact that his services which are performed for Troy State University occur entirely at its Fort Rucker branch. In view of the fact that a state employee cannot receive travel expenses to his permanent base station when he chooses not to live at the place of his base station, the person in question cannot receive travel expenses from his home or place of regular employemnt to Fort Rucker, his official base or station.

If I may be of any further assistance, please contact me.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 22, 1971

Honorable Claude D. Kelley

Director of Conservation

Administrative Building

Montgomery, Alabama 36104

State and State Departments—Conservation Department—Docks Department—State Lands—Leases.

While Docks Dept. has authority to negotiate sale of submerged lands, Conservation Dept. has jurisdiction to manage same.

Opinion by Assistant Attorney General Macrory.

Dear Mr. Kelley:

On March 17, 1971, you submitted a request for an official opinion to Attorney General William J. Baxley, which is as follows:

> "What department or agency of the State has authority and jurisdiction for purposes of negotiation and sale of any area of submerged land in Mobile Bay situated immediately adjacent to the old Brookley Field complex and east of the Garrows Bend Channel, all in Mobile County, Alabama. The submerged land lies shoreward of the pierhead and bulkhead lines (harbor lines) established by authorities of the United States."

In 1951, Assistant Attorney General Straub wrote an official opinion published in Quarterly Report of Attorney General, Volume 65, page 16, based on the interrelation between the following Acts:

> Act No. 341, General Acts 1945, page 554, approved July 9, 1945 (Title 8, Sections 253-265, Code of Alabama 1940);
>
> Act No. 635, General Acts 1927, page 725, approved September 6, 1927 (Title 8, Section 219, Code of Alabama 1940);
>
> Act No. 162 General Acts 1939, page 255, approved March 14, 1939 (Title 8, Section 2, Code of Alabama 1940); and
>
> Act No. 534, General Acts 1947, page 389, approved October 13, 1947 (Title 38, Section 18(1), Code of Alabama 1940).

This opinion dealt with the manner in which funds realized from a certain oil and gas lease covering lands owned by the State of Alabama lying under tidal waters were to be distributed.

The conclusion reached by Mr. Straub was based mainly on Act No. 534, supra which provides that the power and authority to sell "any submerged lands and made lands claimed or owned by the State,

which lands are under or were formerly under any of the tidal waters of the State of Alabama, or which abut such tidal waters" is vested in the Director of the Department of State Docks and Terminals. Act No. 534, supra, restricts its applicability "only to such lands which lie **shoreward** of harbor lines established by the authorities of the United States and of the State of Alabama having jurisdiction over such matters." (Emphasis supplied.) Act No. 534, supra, further provides that "All departments and agencies of the State, other than the Department of State Docks and Terminals, are relieved of any duties, responsibilities and powers with reference to the lands (to) which this act applies . . . . "

However, Act No. 162, supra (Title 8, Section 1, Code of Alabama 1940), creates the Department of Conservation and establishes its purpose to be "to enable the governor to exercise a direct and effective control over **natural resources** . . . and in order to bring together in one department . . . all matters pertaining to **natural resaurces** . . . of the state." (Emphasis supplied.)

In 1955, the State Legislature passed Act No. 367, Acts of Alabama 1955, page 887, approved September 7, 1955 (Title 38, Section 1(18), Code of Alabama 1940, Recompiled 1958) which provides that "The jurisdiction of the department (state docks and terminals) shall not be exclusive, however, and nothing contained herein shall be taken as a deprivation of the authority of the department of conservation to control, hold, lease, manage, or own the minerals, sand, gravel or any other **natural resource** in the beds of navigable streams or other public waters as provided by law." (Emphasis supplied.) This Act was followed in 1956 with Act No. 158, Acts of Alabama 1956 (First Special Session), page 224, approved February 24, 1956 (Title 26, Section 179 [56(1)], Code of Alabama 1940, Recompiled 1958), which provides that "The director of conservation, on behalf of the state, is hereby authorized to lease . . . any lands or any right or interest therein under any navigable streams or navigable waters . . . and the shores along any navigable waters to high tide mark . . . for the exploration, development and production of oil, gas and other minerals, or any one or more of them, on, in and under such lands; and such lands or interests therein for such purposes shall be supervised and managed by the Department of Conservation." The latter two acts clarify and reinforce the responsibility of the Department of Conservation, as set out in Act No. 162, supra, to control, manage and develop the natural resources located on, in, and under lands owned by the state lying beneath tidal waters, whether shoreward or seaward of harbor lines established by the United States and State of Alabama authorities.

Premises considered, the Department of State Docks and Terminals has the authority and jurisdiction to negotiate and sell the **land** in question. However, insofar as the **natural resources** that may be located on, in, or under such land are concerned, the Department of Con-

servation has jurisdiction to ensure that the interests of the State of Alabama in her natural resources shall be fully protected and utilized.

Very truly yours,
WILLIAM J. BAXLEY

Attorney General

March 23, 1971

Honorable Fred D. Ramsey, Superintendent

Marengo County Schools

Linden, Alabama

Schools—Teachers—County Boards of Education.
Reimbursement of County Board because of leave for teachers due to pregnancy approved.

Opinion by Assistant Attorney General Madison.

Dear Mr. Ramsey:

I have your letter of March 22, 1971, which is as follows:

"The Marengo County Board of Education respectfully requests opinions from you on the following questions:

"(1) Is pregnancy considered a sickness whereby a teacher can be absent from her position and be paid by the Board of Education who in turn can obtain reimbursement from the Educational Trust Fund?

"(2) Can local Boards establish policies otherwise if question No. 1 is answered in the affirmative? It would be difficult to hire a replacement the length of time for a teacher being absent having a child at a substitute teacher's pay.

"(3) Does Title 52 Section 136 have any conflict on paying a teacher for more than a period of four weeks at a time during one year due to sickness? Or does this section only apply to leaves of absence?"

The law relating to sick leave for teachers in county systems is now contained in Act No. 1100, General Acts 1969, page 2035, which is as follows:

" 'Section 136. The County Board of Education shall have the authority under such rules and regulations as may be promulgated from time to time by the State Board of Education to provide for the payment from public funds of teachers or other employees of the County Board of Education who are

employed by the year for not over two weeks which said teacher or employee may be allowed by said board as a vacation, but such vacation must not be allowed during the time the schools are in session; and to provide leaves of absence during the time the schools are not in session for such teachers and employees on part or full pay when such teacher or employee devotes such leave of absence to instructing in or attending schools or teacher training or in such manner as approved by the State Board of Education as beneficial to the educational work of the County; and to provide for the payment of any teachers, whether employed by the year or not, for absences during the time schools are in session where such absence results from sickness or some other unavoidable cause which prevents such teacher from discharging his duties; provided that yau for such absence caused by sickness shall not be allowed for a longer time than ninety days accumulated sick leave during any one year; and provided, that any teacher not utilizing or being paid for the sick leave accrued in any one year pursuant to Regulations of the State Department of Education may accumulate and carry over the unutilized days to the next consecutive year or years of employment for the same school system, until he shall accumulate a maximum of ninety days; and pay for such absences resulting from unavoidable causes other than sickness shall not be allowed for a longer time than one week during any one year, and the allowance of any such pay shall at all times be in the discretion of the County Board of Education.'"

As to reimbursing local boards for payments to substitute teachers replacing teachers on sick leave, Title 52, Section 40(4), Code of Alabama 1940, Recompiled 1958, provides:

"The state board of education is authorized and directed to reimburse each county and city board of education from the minimum program fund for payments to substitute teachers who replace teachers absent on sick leave during the time schools are in session and where the regular teacher is paid the contract salary while on sick leave in accordance with rules and regulations of the state board of education. Such reimbursement is to be made on the basis of claims for reimbursement submitted annually on or before July 1 to the state board of education by county and city boards of education. County and city boards of education shall keep such records and submit such reports as may be required by the state board of education as necessary evidence to substantiate claims for such reimbursements.

"The state board of education is authorized to establish a sick leave plan for teachers employed in public elementary

and high schools, define sick leave, determine rate of reimbursement for substitute teachers who serve in the place of teachers on sick leave, limit the number of days of sick leave per teacher for which reimbursements may be made and to make such other rules and regulations as may be necessary for the effective operation of this section.

"Nothing in this section shall be construed as repealing sections 136 or 197 of Title 52, Code of Alabama 1940; provided that if the leave of absence which a teacher would receive under said statutes is more liberal than that provided under this section, said statutes shall remain in force for such purpose but not for the purpose of denying or limiting the benefits under this section (1945, p. 357, appvd. July 7, 1945)."

Although a county board of education may, in its discretion, under rules promulgated by the State Board pay for absences because of sickness of a teacher for a period no longer than the number of days of accumulated sick leave not exceeding ninety days, reimbursement for money paid to a substitute teacher would still be governed by said Section 40(4).

It is my view that absence because of pregnancy would come within the provisions of the above cited provisions of the law.

It is my opinion, therefore, that your first question should be answered in the affirmative; your second question in the negative; and your third question is not answered for it does not state the law as it now exists as shown by Act No. 1100, supra.

I am not, however, familiar with the rules that may have been adopted by the State Board and they might affect the matter under consideration. If you desire any further opinion after receipt of this letter, kindly advise and we will be glad to assist you.

Cordially yours,

WILLIAM J. BAXLEY

Attorney General

March 26, 1971

Honorable L. R. Driggers

Mayor

City of Dothan

Dothan, Alabama 36301

Municipalities—Bids—Contracts.

1. Specifications of the contract entered into must be the same as those used in the basis of the bidding, and any material departure in the contract awarded from the terms on which the bidding is had is invalid.

2. Supplemental contracts or change orders for new and additional work are subject to competitive bid in the same manner as the original contract. Exceptions to this general rule are (a) minor changes for a total monetary amount less than that required for competitive bidding; (b) changes for matters relatively minor and incidental to the original contract necessitated by unforeseeable circumstances arising during the course of work; (c) emergencies arising during the course of work on the contract and; (d) changes of alternates provided for in the original bidding and original contract.

Opinion by Assistant Attorney General Webb.

Dear Mr. Driggers:

I have your letter of February 3, 1971, in which you request my opinion as follows:

"RE: Act No. 217, Alabama Competitive Bid Law.

"The City of Dothan, Alabama, entered into a contract under the Minimum Bid Law to construct a sewage treatment plant in the City of Dothan, together with the necessary outfall lines. This entire project was in excess of one million dollars and has almost been completed, however, during the construction phase of this project it became apparent that certain changes should be made to assist operation personnel in their day to day maintenance of the facility; also, to incorporate certain safety features. These modifications will not alter the scope of the original contract, but will constitute an additional expenditure of approximately two thousand dollars and require a contractor to carry this change order into effect.

"Can the City of Dothan legally enter into this contract for modification with the original contractor without advertiseing and letting the same under the Minimum Bid Law?

"For your information, I am enclosing herewith a copy of the Contract Modification."

Attached to your letter was a Contract Modification, Change Order Request No. 2 on Project No. WPC-ALA-177, dated December 4, 1970, for installation of safety grating at intermediate level in the lift station dry well, and installation of condensate blowoff at low point of main six header. The reason for the change order was listed as to provide a work platform at a reasonable height to as-

sist operational personnel in maintenance of lift station pump shafts and bearings and to convenient point of removal of condensate fan main air header.

This office has previously ruled in Quarterly Report of Attorney General, Volume 53, page 37, and Volume 140, page 14, supplemental contracts are subject to competitive bid the same as an original contract. In a more extensive review of this question, this office held in an informal opinion dated August 13, 1968, to Honorable Dennis Porter, City Attorney for the Town of Chatom:

> "In general, but subject to certain limitations and exceptions, statutes requiring the letting of public contracts to the lowest bidder are regarded as rendering invalid and unenforceable subsequent agreements to pay one to whom a public contract has been duly awarded additional compensation for extras or additional labor and materials not included in the original contract, at least where the additional compensation exceeds the amount for which public contracts may be made without competitive bidding. See annotations contained in 135 ALR 1266, et seq. It has also been said that public authorities cannot enter into a contract with the lowest bidder containing substantial provisions beneficial to him not included in or contemplated in the terms and specifications upon which bids were invited; the contract which they execute must be the contract offered to the lowest responsible bidder by advertisement and any contract entered into containing substantial provisions beneficial to the bidder which were not included in the specifications is void. Any other course would prevent real competition, lead to favoritism and fraud and defeat the purpose of the law in requiring contracts to be let upon bids made upon advertised specifications. See Section 46 of Public Works and Contracts contained in 43 Am. Juris. 789. Some examples noted are such as the holding of the court in **Ely v. Grand Rapids,** 84 Mich. 336, 47 NW 447, providing that paving contracts could not be expanded by supplemental agreement to include gutter paving, this being a distinct matter wholly outside the original contract. Also, it was held in **Sadler v. Eureaka Co.,** 15 Nev. 39, that changes could not be considered as separate and distinct items within a dollar amount for competitive bid when the aggregate total of all changes to the contract exceeds the amount required for competitive bids. In a ruling by this office, reported in Quarterly Report of Attorney General, Volume 53, page 37, it has been held on request by the Highway Director for an opinion regarding addition by supplemental agreement of 1.8 miles to a construction contract that such entering into a supplemental agreement on an entirely new project would be in the very

teeth of Title 50, Section 1, Code of Alabama 1940, requiring competitive bids on public improvements."

In an informal opinion to Honorable A. W. Steineker, Jr., Chief Examiner, dated September 15, 1969, it was further held:

"As to the question of modification of the contract by inclusion of new or additional equipment, I am of the opinion that such modification is subject to the provisions of Act No. 217, Acts of Alabama 1967, page 259. It is highly possible, of course, that the new or addititional equipment is incapable of bid by reason of the necessity of being connected in some way to the equipment on hand; however, this is a matter that should be documented and filed as justification. This is not to say that substantial modification of the contract could be justified without bid, but a minor modification would seem logical as one being incapable of bid because of necessary connections to the original equipment. If any particular modification should arise that is questionable under this general discussion, it should be reviewed separately. It is difficult to establish a general rule for dealing with contract modification; however, for the most part, it might be said as a general rule that those modifications containing new or additional work not contemplated in the original contract or substantially altering or modifying the contract are subject to competitive bid. Informal opinion to Honorable Henry W. Suddath, Clerk, Board of Revenue, Montgomery County, dated July 29, 1968."

In a similar situation, the Alabama Supreme Court has previously ruled that where the charter or act required publication and bids on contracts to be let, the basis of the bidding and the contract entered into must be the same; and any material departure in the contract awarded from the terms on which the bidding is had is invalid. See **Inge v. Board of Public Works of Mobile,** 135 Ala. 187, 35 So. 678, and **Frasch v. City of Prichard,** 224 Ala. 410, 140 So. 394.

As noted in these opinions, the general rule is that any supplmental contract for new and additional work is subject to competitive bid in the same manner as the original contract. There are, however, as noted, some exceptions to the general rule. The following is a category of exceptions noted in the discussion contained in 135 ALR 1272, et seq.:

(a) General exceptions granted by statute such as those minor changes for a total monetary amount less than that required for competitive bidding, such as a change of a window, door or lighting fixture.

(b) Changes for matters incidental to the original contract necessitated by unforeseeable circumstances arising during

the course of work under the contract. An example would be the discovery of quicksand during the building of a bridge or structure or discovery of unusual flood washing. However, these, according to the cases studied, must be relatively minor incidents necessitated by defects discovered in the plans and specifications but must not become what amounts to a completely new undertaking.

(c) Emergency exceptions may be noted. This would apply to sudden and unforeseen emergencies arising during the course of construction such as sudden leakage and flow of polluted water into a public water main or public bathing facility.

(d) Changes provided for in the original bidding and original contract. These changes are usually called for as alternates in the taking of the bids and would not, therefore, alter the basic character of the contract or change the original specifications.

To like effect, note annotations contained in 53 ALR 2d 312, et seq.; see also discussion in Section 120 of Public Works and Contracts, 43 Am. Jur. 862 and 863. In my opinion, the general rules discussed above are applicable to the purchases and contracts executed by municipalities under the provisions of Act No. 217, Acts of Alabama 1967, page 259, cited by you.

I am not familiar with the construction of sewage treatment plants and, therefore, of necessity, I must rely solely on your letter and the facts as presented to me for opinion. Your letter states in part that during the construction phase of this project it became apparent that certain changes should be made to assist operation personnel in their day-to-day maintenance of the facility; also, it became necessary to incorporate certain safety features. These modifications will not alter the scope of the original contract and are relatively minor in character. In my opinion, such changes as those suggested in your letter are permissible under the provisions of Act No. 217 without further competitive bidding as incidental to the original contract and arising out of execution of the contract by circumstances unforeseen at the time of the original letting.

If I may be of any further assistance, please let me know.

Yours very truly,

WILLIAM J. BAXLEY

Attorney General

March 29, 1971

The Honorable George C. Wallace

Governor of Alabama

CAPITOL

State & State Departments—Governor—Employers & Employees—Alabama Prevailing Wage Commission.

State Prevailing Wage Commission establishes wage scale on federally assisted projects.

Opinion by Attorney General Baxley.

Dear Governor Wallace:

I have your request for an opinion of this office regarding the effect on the Alabama Prevailing Wage Law of the Presidential suspension of the Davis-Bacon Act.

Specifically, you ask if the State Prevailing Wage Commission must continue to make wage rate determinations on all projects in excess of $2,000 including Federally-assisted projects to which the State is a party.

It is my opinion that your question must be answered in the affirmative.

Prior to your request this office received a memorandum of law from the Solicitor of Labor, United States Department of Labor, in which that office concluded that the states are now preempted from applying their prevailing wage standards laws to Federally-assisted construction work subject to Davis-Bacon wage protections prior to February 23, 1971. William H. Rehnquist, Assistant Attorney General of the United States, in an attached memorandum, stated his apparent concurrence with the opinion of the Solicitor of Labor, but would limit that conclusion " . . . to federally-assisted construction projects which are subject to statutory provisions . . . requiring the payment of wages determined in accordance with the Davis-Bacon Act. . . . "

In addition to the aforementioned memorandum we have received opinions on this subject from the Attorney General of several states and without exception, each state opinion has been directly contrary to that of the Federal agencies.

Act No. 700, Acts of Alabama, Regular Session 1969, Volume II, page 1260, approved September 11, 1969, establishes a commission to determine the prevailing wage in the particular area on all projects of the state or its agencies. Section 7 of the Act states that in determining that prevailing wage the commission shall consider, be bound by and not fix the prevailing wages higher than: (a) Wage scales fixed by union-management collective bargaining agreements in the

area; (b) the prevailing wage determination made under Davis-Bacon; and (c) wages actually paid various classes of workmen employed on projects of similar character in the same or similar area within the state.

The determination of prevailing wage in Alabama is not based solely upon that established under Davis-Bacon, but this is only one of three factors to be considered by the Commission.

The Alabama Act makes no provision for suspension of the dictates of that Act by the President of the United States, the Governor of Alabama, the Commission or anyone where no rate is established under Davis-Bacon.

I can find not authority in support of the Federal theory of "negative" preemption.

Accordingly, it is my opinion that the Alabama Prevailing Wage Commission must continue to function and establish the prevailing wage to be paid in accordance with Act No. 700, and that the wage rate so determined is applicable to projects which receive Federal assistance.

Sincerely,

WILLIAM J. BAXLEY

Attorney General

March 29, 1971

Honorable O. H. Florence

Assistant Probate Judge

Jefferson County

110 Courthouse

Birmingham, Alabama 35203

Costs and Fees—Department of Industrial Relations—Department of Revenue—Estates—Filing Tax—Jefferson County—Judges of Probate—Public Utilities—State and State Departments.

1. State Departments of Revenue and Industrial Relations are not required to pay the special indexing fee set out in Act No. 1186, Acts of Alabama, Regular Session 1969, for the filing and indexing of documents and instruments in the Jefferson County Probate Office.

2. A person filing a claim against an estate under Title 61, Section 210, is not required to pay the special indexing fee under Act No. 1186, supra.

3. Public utility corporations formed pursuant to Act No. 107, Acts of Alabama, Special Session 1965, and Act No. 29, Acts of Alabama, Special Session 1970, are not required to pay the special indexing fee under Act No. 1186, supra.

Opinion by Assistant Attorney General Lawley.

Dear Sir:

Your request for an opinion from this office dated February 3, 1971, is as follows:

"Your opinion is requested regarding the following:

"Act #1186, approved September 13, 1969, provides as follows: 'Section 3A. There is hereby levied a special indexing fee of One Dollar ($1.00). This fee is in addition to all existing fees and charges on each document or instrument hereafter filed and indexed for record in the office of the Judge of Probate of any such county.'

"Does this Act require the Department of Revenue or other agencies of the State or County to pay this fee on instruments filed under Title 51, Section 883 of the 1940 Code of Alabama as recompiled in 1958?

"Does this Act require the Department of Revenue or other agencies of the State or County to pay this fee on instruments filed under Title 26, Section 240 of the 1940 Code of Alabama as recompiled in 1958?

"Does this Act require the Department of Revenue or other agencies of the State or County to pay this fee on instruments filed under Title 60, Section 61 of the 1940 Code of Alabama as recompiled in 1958?

"Does this Act require a person who is filing a claim in an estate to pay this fee where the filing fee is now .15 under Section 11 of Title 29, said claim being filed as required in Section 210 of Title 61 of the 1940 Code of Alabama as recompiled in 1958? These claims are filed in our Birmingham office and entered on a consolidated docket sheet and are not indexed otherwise. However, in our Bessemer office the claims are indexed in a special claims docket.

"Should the Probate Judge of Jefferson County, Alabama, collect this $1.00 fee on instruments in compliance with Act #29 of the 1970 State Legislature and Act #107 of the 1965 State

Legislature, Sections 15 of each Act being the pertinent sections.

"This law went into effect on January 18th of this year and your prompt reply will be appreciated."

Your first question is answered in the negative. Title 51, Section 883, Code of Alabama 1940, Recompiled 1958, deals with the securing of liens on property by the Department of Revenue for taxes due. Subsection (c) of this section states: "The department of revenue or other agency of the state or county with whom the assessment list, return, or to whom the payment of the tax was due to have been made or paid, may file in the office of the judge of probate of any county in this state a certificate which shall show the agency of the state filing the same, ... " Paragraph (d) of this section states: "Such certificate shall be indexed and recorded under the same provision of law of this state relating to the filing and recording of certificate of judgment, **without cost,** but no acknowledgement or probate of such certificate shall be required." (Emphasis added.) In view of Paragraph (d), I do not think that the Department of Revenue or other agencies of the State or county may be compelled to pay a fee on instruments filed with the Judge of Probate under this section. Act No. 1186, Regular Session, approved September 13, 1969, provides for a special indexing fee "in addition to all existing fees and charges." The Department of Revenue and other state and county agencies do not pay a fee or charge for the filing and recording of certificates under Title 51, Section 883, supra. Therefore, since there is no existing fee in this case, no additional fee could be charged under Act No. 1186. Although this act contains a general repealer clause which repeals all laws in conflict with it, I do not think that it was the legislative intent to impose an additional indexing fee in situations where an exemption from any filing or indexing fee already existed.

Your second question is answered in the negative. Title 26, Section 240, supra, deals with the Department of Industrial Relations and Part (2) of Paragraph E. of this section states: "The director may file in the office of the judge of probate of any county in this state a certificate which shall show the name of the department for which it is filed, the amount and nature of the contributions, interest and penalties for which a lien is claimed, together with any costs that may have accrued, the name of the employer against whose property a lien for such contributions, interest, and penalties is claimed, and the date thereof. Such certificate shall be indexed and recorded under the same provision of law of this state relating to the filing and recording of certificates of judgment, and **without costs,** . . . . " (Emphasis added.) In my opinion, only the Director of the Department of Industrial Relations may file the certificate which is discussed in this Code section and, on the filing of such certificate, the Department of Industrial Relations should not be required to pay a fee since the Code section states that it shall be indexed and recorded without cost.

In answer to your third question, I know of no instrument or certificate required to be filed under Title 60, Section 61, supra.

In answer to your fourth question, Title 29, Section 11, supra, deals with the Alcoholic Beverage Control Board's distribution of profits in excess of two million dollars. I assume that you are referring to Title 11, Section 29, supra, which deals with fees allowed to judges of probate. In my opinion, a person filing a claim against an estate under Title 61, Section 210, would not be required to pay the special indexing fee of one dollar. This fee is charged for documents **filed and indexed** for record. There is no legal requirement that a claim filed against an estate under Title 61, Section 210, be indexed, therefore, the special one-dollar fee cannot be collected.

Your fifth question is answered in the negative. Act No. 107, Acts of Alabama, Special Session 1965, deals with the incorporation of water authorities as public corporations for the purpose of furnishing water service and fire protection service. Section 15 of this act states: "The Authority shall not be obligated to pay or allow any fees, taxes or costs to the Judge of Probate of any county in respect of its incorporation, the amendment of its certificate of incorporation, or the recording of any document." Section 15 of Act No. 29, Acts of Alabama, Special Session 1970, providing for similar public corporations, has the same exemption from paying any fees to the judge of probate of any county for the recording of any document. I think that it is quite clear from these statutes that the Probate Judge of Jefferson County should not collect fees on instruments filed in compliance with these acts.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 31, 1971

Honorable James S. Satterfield

Chairman and Judge of Probate

St. Clair County Commission

Court House

Ashville, Alabama 35953

Counties—Labor—Employers & Employees—St. Clair County.

Employees who wish to have union dues voluntarily withheld may do so.

Opinion by Assistant Attorney General Hall.

Dear Judge Satterfield:

Reference is made to your letter of March 16, 1971, which is as follows:

> "A good percentage of the St. Clair County employees who work on the maintenance and construction of county roads, and whose salary is paid from the gasoline tax fund, have joined a labor union, an affiliate of the AFL-CIO. These employees requested that their union dues be deducted from the salary and remitted to their union.
>
> "The St. Clair County Commission has agreed to deduct these dues from the salary of each respective employee who so desires such deduction providing such a deduction is 'legal.' "Will you please advise us at your very earliest convenience if deducting union dues from the salary of these county employees is legal."

In an informal opinion dated October 20, 1969, addressed to Honorable J. M. Merrill, President, Covington County Board of Revenue, it was held that membership by County employees in a labor union which has for one of its purposes collective bargaining or striking was prohibited by Act No. 720, General Acts 1953, page 974, known as the "Solomon Act," as amended by Act No. 777, General Acts 1967, page 1637. On the other hand, that opinion also held that if the union does not engage in collective bargaining or strikes, there is no constitutional reason for prohibiting County employees from joining such union any more so than a club or church.

In an opinion reported in Quarterly Report of Attorney General, Vol. 87, page 35, it was held that where membership of city employees in a labor union is not prohibited, the city may, in its discretion, deduct dues from wages of such employees at their expense, upon being requested to do so by voluntary written authorization of the employees, and pay the dues to the union designated by the employees, which authorization may be revoked by the employees at any time.

Therefore, if the union to which the employees of St. Clair County belong does not have as one of its purposes collective bargaining or strikes, the St. Clair County Commission may legally deduct the union dues of such County employees upon their written authorization and remit such dues to the union.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

March 29, 1971

Honorable Orville J. Vandergriff

Chairman

Marshall County Commission

Guntersville, Alabama 35967

Counties—Bids—Contracts—Marshall County.

Bid procedure on motor grader approved.

Opinion by Assistant Attorney General Webb.

Dear Mr. Vandergriff:

I have your request for my opinion dated February 23, 1971 which reads as follows:

> "The members of the Marshall County Commission have instructed me to obtain your opinion on the following:
>
> "An invitation for bids for a motor grader for one of our districts was extended to the equipment companies with the following specifications.
>
> "(SEE—COPY OF SPECIFICATIONS—MARSHALL COUNTY)
>
> "The following bids were received:
>
> "(SEE ATTACHED COPIES OF BIDS—)
> 1-A
> 1-S
> 2-A
> 2-B
> 3
>
> "The question is whether the low bid can be awarded legally to the Joe Money Machinery Co., with approximately nine items of the specifications, which were set up by the Commission, not being met; and two other bids meeting specifications, or surpassing them? Or, should all bids be rejected, and issue another invitation to the bidders?
>
> "Your early attention to this matter will be greatly appreciated."

In our telephone conversation of this date, you informed me that the specifications used in the bid request were, to the best of your knowledge, drawn around one particular tractor although they may have been the minimum specifications required by Marshall County in this instance. You also stated that a four-cylinder tractor, as opposed to a six-cylinder tractor, was considered a material difference.

Act No. 217, Acts of Alabama 1967, page 259, requires competitive bidding for all purchases of equipment over $500.00 in value. Section 9 of Act No. 217 provides in pertinent part:

> "When purchases are required to be made through competitive bidding, awards shall be made to the **lowest responsible bidder taking into consideration** the qualities of the commodities proposed to be supplied, their **conformity with specifications,** the purposes for which required, the terms of delivery, transportation charges, and the dates of delivery . . . . The awarding authority or requistioning agency shall have the right to reject any bid if the price is deemed excessive or quality of product inferior. Each record, with the successful bid indicated thereon, and with the reasons for the award if not awarded to the lowest bidder, shall, after award of the order or contract, be opened to public inspection." (Emphasis supplied.)

In a somewhat analogous situation, the Alabama Supreme Court has previously ruled that where the charter or act required publication and bids on public contracts, the basis of the bidding and the contract entered into must be the same; and any material departure in the contract awarded from the terms on which the bidding is had is invalid. See **Inge v. Board of Public Works of Mobile,** 135 Ala. 187, 35 So. 678 and **Frasch v. City of Prichard,** 224 Ala. 410, 140 So. 394.

This office has also ruled in Quarterly Report of Attorney General, Volume 130, page 15, that specifications written into the request for bids must be sufficiently certain and definite to secure a fair basis for competitive bidding and should contain nothing that would otherwise prevent or restrict full and free competition. Specifications should be reasonably related to the work to be performed or purpose for which the material to be purchased is used. A similar conclusion was reached by the Circuit Court of Montgomery County in Equity in the recent case of **McDonald Tractor Co. v. Brewer, et al,** Case No. 38058.

I have reviewed the specifications of the bid request used by Marshall County and the specifications of the various bidders as submitted. The low bid submitted by Joe Money Machinery Company and attached to your request as 1-B has several notable variations, principal among which is that the engine bid is four-cylinder whereas the request called for a six-cylinder. The clutch is two-disc rather than three-plate as called for in the request for bids. The transmission contains six speeds reverse rather than two as called for in the bid and there is some apparent difference in the moldboard and steering on the model submitted.

In my opinion, the specifications used in any request should be reasonably related to the minimum specifications required by the county in order to do the work proposed or the acceptable variation

allowable should be specified in the request for bids which was not done in this instance. In view of the fact that the specifications were drawn around one particular tractor, I am of the opinion that the specifications do not meet the requirements as stated in Quarterly Report of Attorney General, Volume 130, page 15, and would be considered as overly restrictive as written. I am, therefore, of the opinion that the county in this instance could accept no bid and would have to re-bid the equipment based on less stringent specifications reasonably related to the minimum requirements of the county. If the specifications of one particular tractor are to be used, the acceptable variation allowable should be specified in the request for bids. Any bid received below the minimum specifications amounting to what would be considered as "material differences" by those knowledgeable in the field would not be acceptable.

If I may be of any further assistance, please let me know.

Very truly yours,

WILLIAM J. BAXLEY

Attorney General

I N D E X

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